

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)	
)	
)	
Foggy Bottom Grocery, LLC)	
t/a Foggy Bottom Grocery)	License Number: 82431
)	Case Number: 82431-09/072P
)	Order Number: 2010-004
Applicant for a Transfer of)	
Ownership and Substantial Change)	
to a Retailer's Class B License)	
at premises)	
2140 F Street, N.W.)	
Washington, D.C. 20037)	
)	

BEFORE: Charles Brodsky, Acting Chairperson
Mital M. Gandhi, Member
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member

ALSO PRESENT: Constance Miller, Counsel for the Applicant

Barbara Kahlow, on behalf of West End Citizens Association,
Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Foggy Bottom Grocery, LLC t/a Foggy Bottom Grocery (Applicant), located at 2140 F Street, N.W., Washington D.C., filed an Application for a Transfer of Ownership and Substantial Change to a Retailer's Class B License. The Application was protested by West End Citizens Association (WECA), represented by Barbara Kahlow (Protestants).

The matter came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on September 21, 2009, at which time the Application was scheduled for a Status Hearing on October 28, 2009. The protest was not settled and the matter was

scheduled for a Protest Hearing on December 9, 2009. At the conclusion of the Protest Hearing, the Board took the matter under advisement.

Pursuant to D.C. Official Code § 25-313, the filed protest issues are whether the Applicant's substantial change request for extended hours, expansion of operations from one floor of the building to three floors, and the addition of a take-out deli would adversely affect the peace, order, and quiet, as well as the residential parking, vehicular and pedestrian safety in the neighborhood and cause a significant decrease in residential property values. The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Applicant's establishment is located at 2140 F Street, N.W., Washington, D.C. The Applicant filed for a Transfer of Ownership and Substantial Change to a Retailer's Class B License. The requested substantial changes include an extension of operating hours, expansion of operations from one floor of the building to three floors, and the addition of a take-out deli. *See Alcoholic Beverage Regulation Administration ("ABRA") Protest File* for License Number 82431.
2. The Protestants, represented by Barbara Kahlow, lodge this protest against the Applicant based on the effect that the substantial changes in the Applicant's establishment will have on the general peace, order, and quiet, as well as the residential parking, vehicular and pedestrian safety in the neighborhood and cause a significant decrease in residential property values. *See generally ABRA Protest File*, protest letters included therein, License Number 82431; *see also generally, Transcript, 12/9/09*. (hereinafter "*Tr. 12/9/09*").
3. The Board called ABRA Investigator Susan Mitchell, who prepared the Protest Investigation Report in this matter. *Tr. 12/9/09*, at 17, 18. The Applicant is located on the outskirts of the George Washington University (GW) campus. *Tr. 12/9/09*, at 19. The establishment has been operating since 1946 on one floor of a three floor building. *Tr. 12/9/09*, at 19. On July 1, Kristopher Hart purchased the establishment with the intention of renovating in late December and reopening in January 2010. *Tr. 12/9/09*, at 19, 20. There will be a deli on the basement floor; beer and other items, mostly food, will be sold on the first floor; and wine, food, and retail type items will be sold on the second floor. *Tr. 12/9/09*, at 20. There are twelve other ABC-licensed establishments within 1,200 feet of the Applicant. *Protest Investigation Report, 12/9/09*, at 4. (hereinafter "*Report, 12/9/09*").
4. From November 3, 2009, through December 1, 2009, ABRA investigators, including Investigator Mitchell, monitored the Applicant's establishment on eleven occasions at all times of days. *Tr. 12/9/09*, at 18; *Report, 12/9/09*, at 8. During these visits, the investigators observed no ABRA violations. *Report, 12/9/09*, at 8. There were minimal noise and pedestrian safety issues. *Tr. 12/9/09*, at 28. Investigator Mitchell did

not observe any trash or public drunkenness. *Tr. 12/9/09*, at 28. Parking is challenging in the area, but not impossible. *Tr. 12/9/09*, at 28. There is two hour parking, except for residents of the area. *Tr. 12/9/09*, at 28. Also, there is a Metro bus line, garage with 80 spaces at State Plaza Hotel, two designated spaces for the delivery trucks, and employees will have spaces behind the establishment. *Tr. 12/9/09*, at 29.

5. Investigator Mitchell spoke with Protestants, including Barbara Kahlow, Sara Maddox, and Elizabeth Mills. *Tr. 12/9/09*, at 20. Ms. Maddox and Ms. Mills live near the Applicant. *Tr. 12/9/09*, at 20. The Protestants' concerns include: alleged violations of various laws around the establishment; zoning issues, including a nonconforming use as a deli and improperly issued certificate of occupancy; sales to minors and underage drinking; noise; loitering; public drunkenness; public urination; destruction of property; and unsightly trash, especially beer cans; parking customers may take up residential parking spaces; and early morning delivery trucks. *Tr. 12/9/09*, at 21, 23.

6. Investigator Mitchell also spoke with Mr. Hart, who is the owner of the establishment. *Tr. 12/9/09*, at 23. Mr. Hart decided to open early to attract the professionals in the area. *Tr. 12/9/09*, at 24. There are a number of professional buildings in the area. *Tr. 12/9/09*, at 24. He foresees his alcohol revenue as being only 15 percent of his total revenue. *Tr. 12/9/09*, at 24. There will be no music inside or outside of the establishment, and there will be no seating inside or outside. *Tr. 12/9/09*, at 25. Mr. Hart has a petition of support from many area residents, and the Advisory Neighborhood Commission 2A made no objections to his proposals. *Tr. 12/9/09*, at 25. He feels the business will help revitalize the neighborhood. *Tr. 12/9/09*, at 25. To address potential crime, he purchased security cameras for inside and outside the establishment. *Tr. 12/9/09*, at 25.

7. In addition, Investigator Mitchell spoke with Chief Dorothy Stafford, who is the Police Chief at GW. *Tr. 12/9/09*, at 26. Chief Stafford lives nearby and is very familiar with the area. *Tr. 12/9/09*, at 26. According to Chief Stafford, the old Foggy Bottom was an eyesore, and she thinks the establishment looks better even though it is not finished. *Tr. 12/9/09*, at 26. She feels it will enhance the neighborhood. *Tr. 12/9/09*, at 26. With respect to noise complaints, the police often get noise complaints but not from that area. *Tr. 12/9/09*, at 26. Also, she does not foresee any crime because she does not feel like a new element of people are going to come from outside the area. *Tr. 12/9/09*, at 26. And she has not had any reports of public drinking nor does she foresee underage sales. *Tr. 12/9/09*, at 26, 27.

8. The Applicant called Kristopher Hart as a witness on its behalf. Mr. Hart's testimony includes an extensive overview of the location of the establishment in relationship to residential home and professional buildings and businesses. *Tr. 12/9/09*, at 49-60. Mr. Hart also described the many renovations to the establishment. *Tr. 12/9/09*, at 60-67. And he clarified that the basement level is not a deli; instead, it is a prepared food shop. *Tr. 12/9/09*, at 68. In addition, Mr. Hart explained that the proposed hours fit the community, what they want, and it is an amenity. *Tr. 12/9/09*, at 69. Mr. Hart does not foresee traffic issues, because he does not anticipate more than one or two

percent of the establishment's traffic stemming from people driving and there will be no delivery services. *Tr. 12/9/09*, at 75, 76. Further, Mr. Hart stated that truck deliveries would likely not exceed twice a day, with possible 8 a.m. and 2 p.m. deliveries. *Tr. 12/9/09*, at 76. With respect to property values, Mr. Hart believed that he is doing a good thing compared to what the old establishment looked like in the community. *Tr. 12/9/09*, at 77.

9. The Applicant called Devlin Keating as its next witness. *Tr. 12/9/09*, at 112. Mr. Keating is the Chief Operating Officer of the establishment. *Tr. 12/9/09*, at 113. Mr. Keating explained that the establishment is upgrading its security system, which includes an alarm and four security cameras. *Tr. 12/9/09*, at 115, 116. He also described the employee handbook that provides guidance to employees on serving alcohol to persons under the legal drinking age. *Tr. 12/9/09*, at 117. There will also be a computer system (identification card reader) to prevent selling to minors. *Tr. 12/9/09*, at 118. Mr. Keating has never seen consumption of alcohol outside the building and does not foresee issues with public urination and vomiting. *Tr. 12/9/09*, at 120, 121. And he does not foresee issues with trash. *Tr. 12/9/09*, at 123.

10. The Applicant called Anne Savage, a resident and homeowner in the Foggy Bottom Area, as its next witness. *Tr. 12/9/09*, at 133, 134. Ms. Savage, a licensed real estate agent, presented a prepared statement regarding the potential impact of the establishment on residential real estates values in the area. *Tr. 12/9/09*, at 134-138. She does not believe that the establishment will negatively affect property values; instead, she believes that it will increase values in the future. *Tr. 12/9/09*, at 138.

11. The Applicant called Jason Lipton as its next witness. *Tr. 12/9/09*, at 143. Mr. Lipton is a student at GW and lives on the adjacent corner to the establishment. *Tr. 12/9/09*, at 144. He is confident that the establishment would be an improvement to the neighborhood, and has already seen improvements including physical improvements and fewer rats. *Tr. 12/9/09*, at 144. As Vice President of the Student Body at GW, he has spoken to a number of students and has not received any opposition to the establishment. *Tr. 12/9/09*, at 145.

12. The Applicant submitted the prepared statements of Eleanor Becker and Gary Griffith into evidence, who are supportive of the Application. *Tr. 12/9/09*, at 151.

13. The Protestants called Barbara Kahlow, Secretary of WECA, as its first witness. *Tr. 12/9/09*, at 155, 157. Ms. Kahlow believes that adding a late night establishment in a residential zone would further diminish the property values since late night noise would adversely impact the quality of life for long term community residents. *Tr. 12/9/09*, at 160. Ms. Kahlow provided excerpts from GW's Foggy Bottom Campus Plan Compliance, which indicates that 78 percent of the community complaints relate to noise. *Tr. 12/9/09*, at 161, 162. She also expressed concerns about improper parking and the limited on-street residential parking spaces in this immediate vicinity. *Tr. 12/9/09*, at 163. Ms. Kahlow believes that the requested substantial changes will adversely affect the

quality of life in the surrounding neighborhoods which house several high-rise apartment buildings including some in the same city square. *Tr. 12/9/09*, at 167.

14. The Protestants called Elizabeth Mills as its next witness. *Tr. 12/9/09*, at 197. Ms. Mills has lived and worked in Foggy Bottom for the past 30 years; she lives about a quarter of a block from the Applicant. *Tr. 12/9/09*, at 197, 198. Ms. Mills stated that the neighborhood used to be very quiet and peaceful, but it has become increasingly noisy, especially at night. *Tr. 12/9/09*, at 197. According to Ms. Mills, the uncivilized behavior is particularly bad Thursday through Saturday nights with screaming and yelling, public drunkenness, urinating, and vomiting. *Tr. 12/9/09*, at 197. Ms. Mills is opposed to any additional establishments that would encourage more people to roam the neighborhood at night, because she is kept awake or awakened many nights. *Tr. 12/9/09*, at 198.

15. The Protestants called Sara Maddox, a resident of the Foggy Bottom area since 1970, as its next witness. *Tr. 12/9/09*, at 205. During the operation under the previous owner, the delivery trucks double parked to avoid having to formally park. *Tr. 12/9/09*, at 209. This created traffic backups and hazards on the street. *Tr. 12/9/09*, at 209. According to Ms. Maddox, the amount of vehicular and pedestrian traffic has increased greatly since September 2009. *Tr. 12/9/09*, at 209. In addition, during the previous operation, delivery and service trucks arrived before 7:00 a.m. producing additional noise in the neighborhood. *Tr. 12/9/09*, at 210. She also stated that since the establishment has been closed, the degrading public behavior has diminished greatly. *Tr. 12/9/09*, at 211. Ms. Maddox believes that disturbing public behavior will become a repeat situation. *Tr. 12/9/09*, at 211. Also, Ms. Maddox explained that the experience of the neighborhood is from previous business and so far there is no exception given the proposed mode of operation and expansion of hours that there would be a difference. *Tr. 12/9/09*, at 215. She also stated that the parking at State Plaza Hotel is provided for guests and customers and it is not open to general public usage. *Tr. 12/9/09*, at 215.

CONCLUSIONS OF LAW

16. Pursuant to D.C. Official Code § 25-313(a), an Applicant must demonstrate to the Board's satisfaction that the substantial change sought to be made is appropriate for the neighborhood in which it is located. Pursuant to D.C. Official Code § 25-313, the Board shall consider all relevant evidence of the record, including: (1) the effect of the establishment on real property values; (2) the effect of the establishment on peace, order, and quiet, including the noise and litter provisions in §§ 25-725 and 25-726; and (3) the effect of the establishment upon residential parking needs and vehicular and pedestrian safety.

17. With regard to the issues of peace, order, and quiet, the Board found nothing in the Protestants testimony to support a finding that the Applicant's request for an extension of operating hours and expansion of operations from one floor of the building to three floors should not be granted. On the contrary, the Board credits the testimony of

ABRA Investigator Mitchell to support a finding by the Board that granting the substantial change requests will not affect the neighborhood nor alter its quiet nature. At no point did Investigator Mitchell nor other ABRA investigators observe any public drunkenness or trash. And minimal noise was heard by the investigators while monitoring the establishment. Investigator Mitchell also interviewed Chief Stafford, who stated that the police often get noise complaints but not from the Applicant's area. Chief Stafford also has not had any reports of public drinking. In addition, Mr. Hart explained that there will be no music inside or outside of the establishment, and there will be no seating inside or outside.

18. With regard to the issue of residential parking, the Board must determine whether the Applicant's requests for substantial changes will have an adverse effect on residential parking needs and vehicular and pedestrian safety pursuant to D.C. Official Code § 25-313(b)(3). The Board found credible the testimony of Investigator Mitchell who testified that parking is challenging in the area, but not impossible. In fact, there is two hour parking for non-area residents. Also, there is a Metro bus line, two designated spaces for the delivery trucks, and employees will have parking spaces behind the establishment. Investigator Mitchell also testified that she observed no pedestrian safety issues during her visits to the establishment. Pursuant to D.C. Official Code § 25-313(b)(3), the Board finds that when looking at the evidence as a whole, that the Applicant's requested substantial changes will not have an adverse effect on the residential parking needs and vehicular and pedestrian traffic.

19. With regard to the issues of real property values, the Board finds that the Applicant's request for an extension of operating hours and expansion of operations from one floor of the building to three floors will not affect the real property values in the area. The Board credits the testimony of Ms. Savage, who stated that the establishment will not negatively affect property values. Instead, she believes that it will increase values in the future.

20. The Board notes Ms. Maddox's comments that visits to the premises by ABRA Investigators occurred while the establishment was not in operation. The Board recognizes that it is difficult to monitor or discern the impact of an establishment that is not currently open. However, the Board finds that the Applicant has demonstrated that the requested substantial changes to its establishment is appropriate for the location and does not adversely impact the peace, order, and quiet of the neighborhood; residential parking needs and vehicular and pedestrian safety; and real property values.

ORDER

For the reasons stated in the findings of fact, conclusions of law, and the entire record herein, it is hereby **ORDERED** by the Board on this 6th day of January, 2010, that the Application for a Transfer of Ownership and Substantial Change of a Class B License for Foggy Bottom Grocery, LLC, t/a Foggy Bottom Grocery located at 2140 F Street, N.W., is **GRANTED**.

It is **FURTHER ORDERED** that the following condition is hereby imposed on the Applicant and shall become a term and condition of the license:

1. The Applicant's deliveries shall not take place before 8:00 a.m.

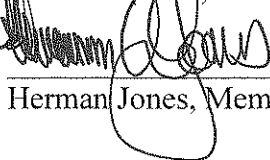
District of Columbia
Alcoholic Beverage Control Board


Charles Brodsky, Acting Chairperson

Mital M. Gandhi, Member


Nick Alberti, Member


Donald Brooks, Member


Herman Jones, Member

Pursuant to Section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code §2-510 (2001) and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).